

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**RICH PRODUCTS**

**And**

**Cases 10-CA-169627  
10-CA-178498**

**LAQUAE LESLIE, an Individual**

*Katherine Miller, Esq.*, for  
the General Counsel.

*Joseph Braccio, Esq.*, for the  
Respondent.

*Zachary Hebert, Esq.*, I for the  
Respondent.

**DECISION**

**STATEMENT OF THE CASE**

JEFFREY P. GARDNER, Administrative Law Judge. The charge and amended charge in Case 10-CA-169627 were filed on February 12 and April 4, 2016. The charge and amended charge in Case 10-CA-178498 were filed on June 17 and August 12, 2016. The consolidated complaint was issued on August 31, 2016.

The complaint alleges that on November 2, 2015, Respondent Rich Products violated Section 8(a)(1) of the Act by restricting Charging Party Laquae Leslie, a union steward, from fully participating in a grievance meeting, and threatening him with suspension and discharge for attempting to do so; and Section 8(a)(3) and (1) by unlawfully suspending Leslie for his union activity. The parties stipulated to the relevant facts regarding the events of November 2, 2015 (Jt. Exh. 1).<sup>1</sup>

The complaint further alleges that on February 9, 2016, Respondent violated Section 8(a)(1) by attempting to provoke Leslie to strike a supervisor, by creating a reasonable fear that the supervisor would strike him, and by blocking his exit; and Section 8(a)(3) and (1) by subsequently, on June 9, 2016, unlawfully terminating Leslie's employment for engaging in union activity.

On December 6 and 7, 2016, I conducted a trial at the Board's Resident Office in Nashville, Tennessee, at which all parties were afforded the opportunity to present their evidence. Upon consideration of the entire record and the briefs filed, I make the following

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<sup>1</sup> Abbreviations used in this decision are as follows: "Tr." for the Transcript, "GC Exh." for the General Counsel's exhibits and "R. Exh." for Respondent's Exhibits. Specific citations to the transcript and exhibits are included only where appropriate to aid review, and are not necessarily exclusive or exhaustive.

## FINDINGS OF FACT

### I. JURISDICTION

Based on the pleadings herein, and the parties' joint Stipulation of Facts (Jt. Exh. 1), the Respondent admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2) (6) & (7) of the Act.

### II. ALLEGED UNFAIR LABOR PRACTICES

#### *Background*

The Respondent is a corporation headquartered in Buffalo, NY, which is engaged in the manufacture and sale of food products with more than 50 locations and over 10,000 employees worldwide. Among these locations is a facility located at 625 Butler Dr., Murfreesboro, Tennessee, where it manufactures frozen bread dough products. The employees of the Murfreesboro facility are represented by the Bakery, Confectionery, Tobacco Workers & Grain Millers International Union, AFL-CIO Local 25 (herein "the Union"), a labor organization within the meaning of Section 2(5) of the Act.

The Respondent and the Union had a collective-bargaining agreement (CBA) in place from March 12, 2013 through March 13, 2016 (Jt. Exh. 1(a)), and subsequently negotiated their current CBA which is effective March 14, 2016 through March 17, 2019 (Jt. Exh. 1(b)). Employees at Rich Products are also subject to the rules contained within the Standards of Conduct (GC Exh. 9).

Charging Party Laquae Leslie had been employed by Respondent since April 2009 as a full-time sanitor, responsible for washing and cleaning equipment with certain chemicals in order to sanitize it for use during production. At some point prior to November 2015, Leslie was elected to a union steward position, a role he retained until his employment was terminated on June 9, 2016.

Leslie testified at the hearing regarding the events of February 2016 and thereafter. Also testifying as to these events were Chief Union Steward David Eddington, Human Resources (HR) Manager Michael Tait, HR Assistant Anna Whitaker and Plant Manager Rick Davis.

Chief Union Steward Eddington currently serves as president of the Union, and was vice president at the time of the underlying incidents in this case. At all relevant times, he has been the Union's chief steward for grievances at Respondent's Murfreesboro facility. Eddington has also been an employee of Respondent for over 25 years, and is currently a full-time maintenance mechanic in addition to his union duties.

Plant Manager Davis oversees all basic operations at the plant, and all department managers at the plant report to him. HR Manager Tait is responsible for all human resources activities at the plant, including employee relations and training development activities. HR Assistant Whitaker reports directly to Tait in Human Resources, but serves as a resource to both Tait and Davis.

**Charge No. 10-CA-169627**

The parties stipulated to the facts underlying this charge (Jt. Exh. 1), and I find as fact all those matters to which the parties stipulated. On November 2, 2015, Leslie attended a grievance meeting as the union steward for employee Sheila Goodrich, who had filed a grievance against Production Lead Rowland Stroble based on his alleged harassment against her union activity. Production Shift Leader Terri Gooch and Stroble attended this meeting on behalf of Respondent.

Near the end of this grievance meeting, Supervisor Gooch asked if Leslie had anything to say or add, at which point Leslie began speaking about either labor laws or the union by-laws. Gooch interrupted Leslie and told him that she did not want to hear about any laws. Leslie responded by stating that it was his turn to speak. Gooch again stated that she did not think Leslie should continue talking and that whatever he was bringing up should be discussed with HR Manager Tait. Leslie responded by stating that Gooch was going to listen to him because he had listened to her.

At this point, Gooch told Leslie to stop talking or he would be suspended, and that she was giving him a direct order not to talk. Gooch also told Leslie to not get loud or she would "walk him out." Leslie told Gooch to do what she thought she had to do, but that Leslie was going to speak. Then Gooch told Leslie that he was suspended and escorted him out of the plant. The parties agree that Leslie did not engage in any conduct during the course of that meeting that would cause him to lose the protections of the Act.

On November 3, 2015, HR Manager Tait learned of the prior day's incident between Leslie and Gooch. On November 6, 2015, Tait met with Leslie, Chief Union Steward Eddington, and HR Assistant Whitaker. During this meeting, Tait told Leslie that Leslie's suspension was revoked, there would be no record of the disciplinary action or suspension in his personnel file, and Respondent would compensate Leslie for the work-time Leslie had lost. Respondent did in fact compensate Leslie for the wages and benefits he lost while suspended, and Respondent removed all discipline related to the November 2, 2015 meeting from Leslie's personnel file.

Tait also told Leslie that Respondent understood his rights, and his rights would be protected in the future. Tait did not specifically list or name the rights that Respondent had violated and would respect in the future. Employee Goodrich (who was present during the entire November 2, 2015 grievance meeting, and witnessed Gooch's conduct toward Leslie) was not present for this November 6, 2015 meeting, and no representative of Respondent ever spoke with Goodrich to inform her that the Employer knew that a union steward's rights include the right to participate in a grievance meeting and argue on behalf of the employee without fear of retaliation.

Although the Union had initially filed a grievance over Leslie's suspension, the November 6, 2015 meeting occurred prior to the grievance being heard through the contractual grievance process. As a result, on the grievance paperwork dated November 11, 2015, it states "no discipline action placed on file, associate paid for all lost time." (Jt. Exh. 1(c)).

Respondent admits that Leslie was engaged in protected concerted activity when he raised collective concerns and vigorously disagreed with management on November 2, 2015. Respondent further admits that it violated the National Labor Relations Act when Supervisor Gooch threatened Charging Party Leslie with suspension and subsequently suspended

Charging Party Leslie on November 2, 2015. However, Respondent did not advise any other employees, including Goodrich, of its admission nor of its offered remedy.

**Charge No. 10–CA–178498**

All parties agree that on February 9, 2016, Leslie attended a meeting with Chief Union Steward Eddington, HR Manager Tait, and HR Assistant Whitaker, and that during this meeting, some form of altercation occurred between Leslie and Tait. The General Counsel and Leslie maintain that this altercation directly led to Leslie's filing a criminal assault charge against Tait. Respondent maintains that Leslie's filing of the criminal complaint against Tait was false and malicious, unjustified by the events of February 9, 2016, and was the reason Respondent subsequently discharged Leslie on June 9, 2016.

**The Events Leading up to the February 9, 2016 Meeting**

The impetus for the February 9, 2016 meeting began the week prior. As a union steward, one of Leslie's responsibilities included scheduling vacation days for other employees, and Leslie's immediate supervisor at the time, Robert Adams, had asked Leslie to speak with another employee, Melvin Rawls, to schedule that employee's vacation. On Sunday, February 7, 2016, Leslie tried to find Rawls at work, but learned that Rawls had been discharged due to an issue he allegedly had with another employee named Isabella. Leslie then decided to investigate why Rawls was discharged by first speaking with Isabella, and later discussing the issue with the supervisor on duty, Rose Hall, who was covering for Adams that day.

Leslie testified that while speaking with Ms. Hall, he became concerned that Hall did not appear to be her normal self, and may have had a health issue. So, Leslie called HR Manager Tait, who was not at the facility that day, and reported that Ms. Hall was either under the influence or may have overmedicated herself. Tait thanked Leslie for the call, told Leslie he appreciates any time someone contacts him with a concern like that, and assured Leslie he would investigate.

Because of the concerns Leslie raised, Tait went to the facility that day to investigate and check on Hall's well-being. According to Tait, upon meeting with Hall, he did not find any reason to be concerned with Hall's behavior. Indeed, Hall apparently told Tait that it was Leslie who was the problem because when she had arrived to work that day, Leslie cornered her and began asking her about Rawls and why he was no longer employed. Hall also allegedly told Tait that Leslie had also approached Isabella and prevented her from working for about an hour and that Isabella allegedly wanted to file a harassment intimidation complaint against Leslie.

It is undisputed that in the collective-bargaining agreement in effect at this time, Article 36 sets forth the rules that union stewards must follow when conducting investigations during work-time. Specifically, "the shop steward shall be permitted to leave his job with the permission of his immediate Team Leader to investigate a grievance" and in addition, "the steward must receive the permission of the other Associate's immediate Team Leader before contacting such Associate" (JX 1(a)). It is undisputed that Leslie did not have Hall's permission to conduct an investigation into Rawls's termination during work-time, despite having been previously asked by Adams to schedule Rawls's vacation.

After receiving the version of events from Hall, Tait testified that he called Isabella to his office to discuss her alleged concerns, and that Isabella identified another employee, Tommy

Barrett, who purportedly witnessed her confrontation with Leslie. Tait testified that he spoke with Barrett as well, and that he requested statements from both Isabella and Barrett summarizing their accounts of the events that transpired that day.<sup>2</sup>

Based on his conversations with Hall, Isabella and Barrett, Tait concluded that Leslie had been conducting an investigation on work-time without Hall's permission. Tait then emailed Union Business Agent Jeff Webb and Chief Union Steward Eddington to advise them of the situation and of Tait's intent to meet with Leslie on Leslie's next scheduled workday to remind Leslie of his obligations under the collective-bargaining agreement to seek prior permission from his supervisor to be away from his workstation. Although Tait indicated in his email that the meeting would be "a friendly conversation," he nevertheless requested that Eddington be present for the meeting, which was scheduled for the next day, February 9th, at 1 p.m.

### **The February 9, 2016 Meeting**

#### *The Initial Meeting Regarding Leslie's Investigation*

The meeting took place in the office conference room, which has a long conference table in the center, approximately 25 feet long and 15 feet wide. The table is positioned in the room such that there is approximately 3 feet between the table and the wall on the right side as one enters. Tait approximated that two people could walk through on that side of the table. However, there is only approximately 30 inches between the other side of the table and the left wall. The walking space is narrower on that side of the table, such that only one person could walk through on that side at a time.

Leslie testified that on February 9, 2016, in the early afternoon, Supervisor Adams radioed him and told him that he needed to go to the front office. Leslie testified that he was not sure why he had been called to the office or what the meeting was going to be about. When he arrived, he saw Tait, Whitaker, and Eddington sitting at the conference table in the front office. Tait and Eddington were seated on the wider right side, and Leslie took his seat on the narrower left side. Whitaker was also at the table, near the door, though it is unclear on which side of the table she was seated.

The meeting began with Tait's thanking Leslie for bringing concerns about Supervisor Hall to Tait's attention, but that Tait had not found any problem with Hall's behavior. Tait then told Leslie that this was not a disciplinary meeting, but that while he was at the facility investigating the situation with Hall, he had learned of Leslie's having spoken with Isabella and Hall away from his job station during work-time. Tait referred Leslie to Article 36 of the CBA, and reminded him that if Leslie needed to leave his job station in the future in his role as a steward, he needed to get permission from his immediate supervisor, and that if he needed to talk with another employee, he needed permission from that person's supervisor as well. Leslie did not deny having left his work-station that day, but instead, responded by telling Tait that he believed he had dotted his "I's" and crossed his "T's" because he had gotten permission from Supervisor Adams the prior week to leave his work-station to schedule Rawls's vacation.

Whitaker and Tait both testified that during this exchange, Leslie's demeanor changed, that he got upset, defensive, and responded to Tait in a loud voice. Specifically, Whitaker

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<sup>2</sup> Neither Isabella nor Barrett testified at the trial, nor were their statements offered into evidence. However, the specifics of their versions of the events are not at issue in this case.

testified, "It was a pretty extreme, like, mood shift. So he seemed pretty calm at the beginning and then once Mike brought that up . . . he kind of bulked up, his body language changed, and he was defensive." She described Leslie's voice as "loud" and "[d]efinitely not a friendly tone." Eddington appeared to corroborate Whitaker and Tait when he testified that he recalled Leslie saying, "I knew you were going to turn this on me," and further testified that Leslie "seemed like he was getting defensive as he spoke loudly." However, Eddington also testified that when Leslie first responded to Tait, he did not seem mad and did not get any louder than he normally does, but that Leslie is typically a loud person.

Leslie testified that it was Tait who became "outraged" and appeared upset that "his plan" had backfired. Leslie testified that he believed this meeting was a potential disciplinary meeting and that he felt Tait was trying to find a reason to "walk me out." In response, Leslie testified that he was intentionally trying to provoke Tait during the meeting and "push his buttons" to show Tait that Leslie was not scared of him.

Tait told Leslie that since Adams was not even there that day, Leslie would have needed permission from his immediate supervisor, at which point further arguing ensued. Leslie accused Tait of engaging in his "typical behavior," which he testified was Tait's "bringing you in a room, refraining you from talking, or threatening your job. It's always your job on the line if you say something." When asked on cross-examination, Leslie could identify only one earlier November 2015 incident as an example of his feeling belittled by Tait, without explanation of the details of that alleged earlier episode.

None of the other witnesses, including Eddington, corroborated Leslie's assertion that Tait had become "outraged" or appeared upset at this point in the meeting. For his part, Tait denied that he ever became upset during this meeting and maintained that he continued at all times to talk with Leslie in a normal tone of voice, although both Leslie and Eddington disputed that with regard to the latter part of the men's interaction.

Leslie and Tait continued arguing about whether Leslie had secured the proper permission which Leslie had claimed or whether Leslie's prior permission from Supervisor Adams was not enough, and that Leslie still would have needed permission from Supervisor Hall, who was actually on duty that day. Tait testified that he felt the conversation was veering off topic and getting nowhere, so he decided to end the meeting. All four witnesses present agreed that the meeting appeared to be ending when Tait stated "this meeting is over with," and they all began packing up their things to leave the room.

At this point, Leslie testified that he felt the meeting was indeed over, and that Leslie had successfully pushed Tait's buttons and stood up to Tait. Tait testified that he and HR Assistant Whitaker then got up and started to exit the room. Tait opened the conference room door for Whitaker to exit, and while he did this, Tait maintains that he stated that this conversation had gotten "stupid." Whitaker also remembered that Tait made a comment about the conversation being stupid shortly after saying the meeting was over.

By contrast, Leslie testified that as Whitaker and Tait exited the room, he heard Tait say "Laquae is stupid." When Leslie heard this, he called after Tait, "Mike, did you just call me stupid?" Tait and Whitaker both agree that Leslie called after Tait asking Tait if he had called Leslie stupid. Whitaker testified she was at the threshold of the door on the way out of the room when she heard Leslie call out to Tait. She also testified that she then left the room at this point, so she only heard, but did not see, what occurred afterwards in the room. Eddington did not

remember hearing what either Tait or Leslie said at this point. Eddington only remembered that the meeting seemed to have ended, that Tait and Whitaker were exiting the room, and that Tait suddenly returned.

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*The Altercation following the Initial Meeting's End*

Tait testified he was holding the door for Whitaker and had not yet crossed the door threshold when he made the "stupid" comment. Leslie testified that Whitaker and Tait were both walking out of the room, with Whitaker having already left, and Tait still at the door threshold. Eddington testified that Tait had broken the "plane of the door." Regardless, after Leslie accused Tait of calling Leslie stupid, it is undisputed that Tait came back towards Leslie and ended up standing in front of Leslie on the left side of the conference table where Leslie had been sitting for the meeting. It is also undisputed that there was not enough room for two people to pass each other on this side of the table without touching. However, all three men who remained in the room testified slightly differently about how this came to be, and what happened next.

**a. Leslie's Version**

Leslie testified that Tait charged back into the room towards Leslie at a fast walk with his hands up like he was going to bear hug Leslie. Leslie further testified that Tait loudly yelled at Leslie that Tait had not called Leslie stupid as Tait charged towards Leslie. Leslie claims to have felt that Tait was rushing towards him to possibly hit him, so Leslie stood up to be able to defend himself. Leslie testified that he had been seated up until Tait charged at him. Leslie testified that Tait stopped walking about 1 foot from Leslie and they were face to face. Leslie claims to have felt Tait was threatening him by "walking up" on him. Leslie testified that at first, Tait's hands were open as Tait charged towards him, but as Tait and Leslie argued back and forth, Tait's hands dropped to his waist with his arms bowed out a little, and he made lightly closed fists with his hands. Leslie testified that he thought he needed to defend himself at this point because Tait was standing in a "bodybuilder pose," with his hands down and fists closed.

Leslie acknowledged that he yelled at Tait very loudly - "to the top of my lungs" - to get out of Leslie's face, and to get out of Leslie's way. Leslie testified that Tait responded by telling Leslie that he could walk the other way around the table. Leslie felt he had to stand his ground and not go around the table as Tait had indicated. Leslie testified that he felt like he was going to be attacked and he should not turn his back on Tait. Leslie testified that Tait had stepped within his "inner circle" in a threatening manner, and this caused Leslie to fear for his life and fear that Tait was going to hit him.

Leslie testified that Tait said something to the effect that if Leslie had a recorder on him that Tait would walk him out. Leslie responded that "recording" could mean "documenting in writing" instead of just using an electrical device. Leslie also told Tait he had no right to tell him what he could and could not do. Leslie testified that he has a habit of recording meetings. He stated that he actually did attempt to record the February 9th meeting, but his cell phone malfunctioned and he was not able to record it.

Leslie testified that he did not use the term "egress" at any time. Leslie testified that the altercation ended when Plant Manager Rick Davis burst into the room and loudly declared "this

meeting is over with.” Leslie testified that when Davis came into the room, Tait jumped aside out of Leslie’s way. Leslie and Eddington then exited the room.<sup>3</sup>

#### **b. Eddington’s Version**

Eddington did not recall what prompted the altercation, but he testified that at the end of the meeting, Whitaker and Tait had seemingly left the conference room, and then Tait came back into the room and walked towards Leslie at a fast pace. Eddington testified that Tait had his arm out in front of him and was pointing a finger at Leslie as Tait walked towards Leslie, but that he was not yelling at that point. Eddington testified that Tait stopped in front of Leslie and they were about a foot or two away from each other. Eddington recalled that Tait was pointing his finger at Leslie and quizzing him in a pretty stern tone about whether Leslie was recording the meeting. Eddington testified, however, that Tait did not clench his fists at any time.

Eddington heard Leslie shout at Tait a few times to stop blocking Leslie’s path to the door. Eddington explained that if Leslie had wanted to walk straight out towards the door, Tait was in his path and was blocking that path. Eddington also explained how Leslie could also have walked around the table in the other direction and still exited the room along with Eddington, which is what Leslie eventually did.

Eddington testified that he felt embarrassed by the tone this meeting had taken. Eddington explained that it was not typical for a meeting to devolve into a shouting match, although he testified that he had no sense that a physical altercation was about to occur at any point during the men’s interaction. Indeed, Eddington’s response to the men’s arguing was to try to close the conference room door, out of embarrassment at how loud the argument had become. Eddington then went back to his spot at the table. At this point, Rick Davis came into the room and said something to stop the argument, whereupon Eddington and Leslie exited the room.

#### **c. Tait’s Version**

Tait testified that Leslie had stood up at the end of the meeting when Tait and Whitaker were walking towards the door. When Leslie yelled after Tait asking Tait if he had called Leslie stupid, Tait didn’t want Leslie or Eddington to think Tait had called Leslie stupid, so Tait walked back to Leslie to clarify his comment. Tait testified that he walked back toward where Leslie was standing and told Leslie that Tait had not called him stupid, but had called the conversation stupid. Tait then claims Leslie began talking again about his own issues and how Tait could not tell him what to do.

Tait testified that he was standing about 2-1/2 feet from Leslie, and that Leslie was talking in a very loud voice. Tait further testified that Leslie took a step towards Tait and seemed to be angry, causing Tait to take a step back. Tait felt that Leslie was potentially going to “chest bump” or push Tait, although he acknowledged no physical contact occurred. As Leslie allegedly stepped toward Tait, Tait remembers Eddington saying, “Whoa, whoa, whoa,” as if to intervene. Tait testified that Leslie loudly yelled at Tait to not block Leslie’s “egress.” Tait says when he heard the word “egress,” Tait believed Leslie was trying to set him up, so Tait

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<sup>3</sup> In a statement Leslie gave to Respondent during its subsequent investigation of the day’s events, Leslie stated that when Davis came into the room, Tait was still “in [his] face” and that Davis said loudly “Alright Break It up!!!” which Leslie argued in that statement proved there had been a fight in progress. (GC Exh. 7).



told Leslie while pointing to the other end of the table, "If you want to leave, walk around that table and walk over there with your chief union steward."

Tait acknowledged that he may have raised his voice a little, but maintained that he otherwise maintained a normal conversational tone. Tait also admitted that he did not get out of Leslie's way despite what he considered to be Leslie's aggressive motions towards him. Tait told Leslie that he hoped Leslie was not recording the conversation, and that Leslie said he could record anything he wanted and "record" could mean handwriting and not just electronic recording. Tait admitted that there is no rule prohibiting recording a meeting, employees just cannot have their cell phones on the plant floor. Tait testified that the confrontation ended with Plant Manager Davis entering the room. Tait recalled that when Davis entered the room, Leslie had walked back around the far edge of the table and was heading towards the door.

#### **d. Whitaker's and Davis's Versions**

Ms. Whitaker had left the conference room prior to the altercation, but could hear Leslie yell in what she considered a loud, aggressive tone, "Are you calling me stupid?" It made her uncomfortable, and she did not want to go back in the room, so she looked for Rick Davis and saw him and his boss down the hall about 15 feet away. She immediately went to him and told him about what she heard going on in the meeting and how it got out of hand when Leslie started yelling in a disrespectful manner. She stated that she could still hear Leslie's voice from her new location, but she did not hear Tait's voice. Davis said he would take care of it and immediately went to the conference room.

Plant Manager Davis testified that he was walking by the front office with his boss, Manager Scott VeRost, and he could hear Leslie's voice yelling out of the office area. They continued to walk past the door, but stopped about 15 feet past the door because of the commotion they were hearing. Davis turned back towards the door and saw it open and HR Assistant Whitaker step out into the hallway. He described her as looking flustered or concerned. Davis asked Whitaker what was going on and she told him that Leslie was acting very disrespectful, loud and threatening toward Tait.

Davis continued to hear Leslie loudly yelling and says he was concerned for Tait's safety, so Davis opened the door and announced that the meeting was over. At that point, Leslie gathered his things, walked around the conference table, and exited the room with Eddington. Thereafter, Tait walked out of the room and spoke with Davis and VeRost. Davis testified that Tait looked flustered and exasperated.

By everyone's account, upon Davis's arrival to the conference room, the argument between Leslie and Tait immediately ended.

#### ***The Aftermath of the February 9 Meeting***

Sometime after the conclusion of the meeting, Eddington received a text message from Leslie that said, "I hate for this to have to happen but this shit got stop. Lol if u need reminder how meeting went lol hint hint I (RECORD) everything." (Rx. 1; Tr. 128) (emphasis in original). Eddington testified that he felt Leslie was offering to help him with giving a statement to a Board Agent if he needed help. Eddington stated that he did not ask Leslie to help him prepare any statement, and that he did not have a conversation with Leslie regarding his recollection of the meeting. No recording of the meeting was offered at trial.

Also at some point after the February 9th meeting, Eddington testified that Leslie made a comment to him in person that Leslie was going to file a criminal complaint against Tait. Eddington testified that he (Eddington) "kind of looked at him" and that he "was surprised about it" because "it's not something [he] would have done." Eddington explained, "I don't know the definition of the law, but I didn't see that it was a physical assault . . . It was an argument." Eddington also testified that he did not have a sense that Leslie's life was in any danger or that Tait was going to hit Leslie or otherwise cause any bodily injury to him.

Tait's next interaction with Leslie occurred 2 days later during the first negotiating session for the successor CBA on February 11, 2016. Everyone at that meeting, including Leslie, was in a positive mood. In the following days, Tait and Leslie had a few additional interactions both at and outside the negotiating table, and each interaction was friendly. Leslie testified that there were no other angry confrontations between the two of them, other than that of February 9, 2016.

### **The Assault Charge and Trial**

After the February 9, 2016 incident with Tait, Leslie went back to work. Once his shift ended, he went to the Rutherford County Murfreesboro Police Department and signed an incident report prepared by a police officer based on Leslie's description of his incident with Tait. The incident report alleged that Leslie suffered an "assault by intimidation." Leslie testified that he used to be a police officer in the Fayetteville Police Department in Tennessee and he was aware of what an "assault" was under the law. The "narrative" on the incident report states:

On 2/9/16 I officer B. Frazer was dispatched to 302 S. Church St. in reference to assault. Upon arrival I made contact with Laquae Leslie. Leslie stated that he had a meeting with his HR manager Mike Tate on 2/9/16 at 1330 hours. Leslie stated he works for the Union at Rich's Food 625 Butler St. Murfreesboro. Leslie stated that Tate ran up on him like he was going to fight Leslie during the meeting. Leslie stated that he feared for his life because Tate was very upset. Leslie stated that he the HR always treats the Union workers bad. Leslie stated that Tate did not hit him but came close to his face. Tate made a fist with both hands and jumped into Leslie's face. Leslie was advised of the warrant process (GC Exh. 3).

The officer told Leslie the police station would take 3-4 business days to process the report, and that he would then need to take the report to the sheriff's department to obtain a warrant.

On February 15, 2016, Leslie completed an affidavit of complaint with the Rutherford County Sheriff's department, which included a statement drafted by Leslie, in which Leslie repeats that he felt in "danger for my life" during the February 9th incident. Leslie testified that he wrote this document out while at the sheriff's department and he did not have the incident report with him when he wrote the affidavit of complaint, nor did he have any other notes with him about the incident. In this affidavit of complaint, Leslie wrote:

On 2-9-16 I Laquae Leslie was in a meeting with Mike Tait. The meeting was ended by Mike Tait in an anger manor. Shortly after Mike exit the room he stormed back in the yelling at me. I felt the he was trying to engage in a fight with me. At this point and time I was intermittent danger for my life. I yelled commands for him to please get out of my face and path of exiting. Mike refuse to move from my path freeing me to leave a

meeting that was ended. The Plant Manager herd my yells and come in the room to stop Mike form trying to fight me. This was witness by David Eddington and this did happen in Murfreesboro TN (GC Exh. 4).

5 According to Leslie, after he wrote this statement, he handed it to the clerk, who then returned the incident report back to him. Leslie testified that the clerk typed up another form based on the statement he had just provided. Leslie reviewed this form, the "criminal summons" affidavit of complaint, and signed it. This form stated that Leslie had personally appeared before the clerk and made "oath" to the following statement of facts:

10 That on the 9th day of February 2016 in Rutherford County, Tennessee, Michael Tait did unlawfully, intentionally, knowingly or recklessly cause Laquae Leslie bodily injury or (1) intentionally or knowingly cause another to reasonably fear imminent bodily injury, in violation of T.C.A. 39-13-101, A-M. Affiant makes oath that on above date, affiant was in a meeting with Michael Tait. The meeting ended in an angry manor. Tait left the room and stormed back in the room yelling at affiant. Affiant felt like Tait was trying to fight him. Affiant was placed in fear at this time. Affiant asked Tait to get out of his face and to let him leave, to which Tait refused. Plant Managers heard affiant yelling and came in the room to stop Tait from fighting affiant. Therefore, Michael Tait is being charged with assault (GC Exh. 5).

After Leslie finished with this paperwork, the clerk told him that the criminal summons would be mailed to Tait and they would notify Leslie of a court date whenever it was scheduled.

25 Tait testified that he received an orange postcard in the mail at his home on about February 19, 2016, that indicated he had been charged with criminal assault and needed to turn himself in. Tait retained legal counsel and turned himself in at the sheriff's office on February 25, 2015. Tait testified that he felt scared as he was booked, fingerprinted, and had to have a mug shot taken. Tait was given an affidavit of complaint, but no additional information or documentation, and did not have any specific information about his arrest until he obtained the police report at a later time which included Leslie's account of the February 9th meeting.

35 Tait was released and was given a summons ordering him to appear in court on April 24th. He returned to work the following day. Because the summons and Tait's mugshots were public records and readily accessible on the Rutherford County Sheriff's Office website, many employees reportedly heard of Tait's arrest and saw his mug shots, copies of which were passed around the plant among employees. This occurred while Respondent and the Union had begun negotiations over a new collective-bargaining agreement.

40 Tait was subsequently granted a preliminary hearing, which was to be held on May 25th. On that date, Leslie, Tait, Davis, Whitaker, and Eddington all went to the courthouse, and each met individually with the Assistant District Attorney (ADA) who was handling the case, and told her what they had witnessed. However, the preliminary hearing was never held because the ADA, after speaking with the potential witnesses, declined to prosecute. Leslie testified the ADA told him she did not have enough probable cause to go forward with the case, so she was going to dismiss the case. Tait did appear before the judge, who stated that there was no probable cause to proceed further on the charge. The case was dismissed, and thereafter, Tait had his criminal record expunged.

**Respondent's investigation and discharge of Leslie**

Respondent had taken no disciplinary action against Leslie following the February 9, 2016 incident. Davis testified that he did not even talk with Leslie about the February 9 incident until after the criminal complaint against Tait had been dismissed. However, following the dismissal of the criminal charge, on about June 6, 2016, Davis met with Leslie in his office, where Eddington, Whitaker, and another Rich Products manager were present.

At this meeting, Davis informed Leslie that Respondent was investigating the incident and had questions for Leslie to answer. Davis gave Leslie a letter signed by Regional Human Resources Manager Sandra Daniels and dated June 6, 2016, explaining that an investigation would be conducted to review Leslie's actions with regard to the statement he provided to law enforcement. (GC Exh. 6). Davis instructed Leslie that he had to answer these questions regarding the criminal complaint and return the written answers within a week for Respondent's investigation. Leslie provided his handwritten answers to Respondent the next day, June 7, 2016. (GC Exh. 7).

After reviewing Leslie's response, and considering what he described as Leslie's "whole situation" with Tait, Davis testified that he made the decision to terminate Leslie's employment based on what he deemed to be the false statements that Leslie had made to law enforcement.

On June 9, 2016, Davis summoned Leslie to his office where Whitaker and Eddington were already present. Davis informed Leslie that the investigation was concluded and the Employer would be terminating his employment because he provided false information to law enforcement and during the investigation, which Davis said constituted several violations of the Rich Products Standards of Conduct.

Davis consulted pre-written notes to use as his script in discharging Leslie and he essentially read these notes aloud to Leslie. (GC Exh. 8). On these discharge notes, five "standards of conduct" numbers are listed - #6, 11, 14, 15 and 16 - and Davis testified that these correlated with the reasons Respondent discharged Leslie. Davis explained that he only read the standards of conduct numbers out loud to Leslie, but did not go into detail about the specific conduct that violated these standards.

Davis testified that the standards of conduct were examples of behavior that could lead to termination even without prior warnings. The first standard of conduct Davis found Leslie to have violated was number 6: "dishonest, misrepresentation or falsification of company documents or employment data." Davis testified that Leslie violated this standard with his "dishonest misrepresentation and falsification of that – the whole – that whole situation, which was part of employment."

The next standard, number 11, prohibits "coercing, intimidating, harassing, physical violence, threatening language or behavior towards any supervisor, associate, vendor, or visitor." Davis testified that Leslie violated this standard based on his actions on February 9, his loud voice, and allegedly threatening language and aggressive behavior, were "part of it."

The next standard, number 14, prohibits "gross misconduct that is detrimental to the image of Rich Products." Davis explained that Leslie's conduct during the February 9 meeting and his conduct in lying to the police broke this standard of conduct. Davis testified that Leslie's misrepresentation of the events of the meeting was the more significant issue to him.

The next standard, number 15, prohibits “interfering with the normal flow of business through Associate coercion, equipment sabotage or intentional work slow down.” Davis testified that he felt Leslie had disrupted the company workflow by having Tait arrested as this disrupted company operations and distracted employees when Tait missed work to deal with the arrest warrant. Respondent also argues that business was disrupted when Tait’s arrest record and mugshot became public and were distributed in the workplace.

Lastly, standard 17 prohibits “falsified records, stating or making false claims of injury. Davis again believed the documents that Leslie “signed his name to” and provided to the police were falsified records. Additionally, Davis felt Leslie’s answers to Respondent’s questions also contained false statements and were therefore falsified records. Davis testified that he had terminated another employee, Michael Smallwood, in the past for making false statements.<sup>4</sup>

Tait explained that in his opinion, Leslie was discharged because Respondent’s investigation revealed evidence that Leslie made specifically false statements in what he viewed to be a deliberate and malicious attempt to create a narrative conforming to the legal definition of an assault. Tait and Davis both discussed Leslie’s previous background as a police officer and how Leslie knew the right “legalese” to use to make the February 9 meeting appear as an assault. Tait believed this is why Leslie allegedly used the word “egress” when yelling at Tait, and writing that Leslie was in “intermittent [sic] danger” because Leslie knew “imminent” was part of the statute for assault.

After Leslie’s termination, the Union filed a grievance which it pursued to the third step of the grievance procedure. However, after the grievance was denied at the third step, the executive committee of the Union decided not to arbitrate.

## ANALYSIS

### **A. Respondent violated 8(a)(3) and 8(a)(1) of the Act on November 2, 2015, and has not fully remedied these violations.**

With regard to the events of November 2, 2015, I find, in accordance with the parties’ factual stipulation, that the Respondent, through Supervisor Gooch, refused to allow Leslie, in his role as union steward, to fully participate and assist employee Goodrich, that it threatened Leslie with suspension for attempting to participate in the representation of Goodrich, and did in fact suspend Leslie because of his attempts to speak during the meeting.

As explained in the stipulated facts regarding the November 2, 2015 meeting, Respondent admits it violated Section 8(a)(1) of the Act when Supervisor Gooch prohibited Leslie from fully participating in the meeting in his role as union steward, and Section 8(a)(3) of the Act by threatening Leslie with suspension and/or discharge for attempting to participate in the meeting, and actually suspending Leslie based on his actions during the meeting (JX 1). The only question is whether Respondent effectively repudiated the violation. I find that it did not.

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<sup>4</sup> Smallwood, who was also in the sanitation department, punctured a line and caused a leak when he was drilling holes one day. Davis initiated an investigation during which Smallwood initially denied that he was responsible for puncturing the line. A number of days later, Davis talked to Smallwood again, and he admitted that he caused the leak in the line. Davis said that he had to terminate Smallwood’s employment because he lied during the course of the investigation.

The Board allows employers to relieve themselves of liability for unlawful conduct when the employer makes an effective repudiation. In *Passavant Memorial Hospital*, 237 NLRB 138 (1978), the Board held that an effective repudiation must be “timely,” “unambiguous,” “specific in nature to the coercive conduct” and “free from other proscribed illegal conduct.” *Id.*, citing *Douglas Division*, 228 NLRB 1016 (1977). Furthermore, there must be adequate publication of the repudiation to the employees involved, and the employer must not engage in any further proscribed conduct after the publication. Finally, the repudiation or disavowal of coercive conduct must include an assurance to employees that, going forward, there will be no interference with employee Section 7 rights. *Id.* at 138–139.

In the instant case, Respondent did swiftly move to correct its mistake by emailing the Union the day after the suspension, and returning Leslie to work within the week with no loss of pay. However, Respondent admits that when HR Manager Tait met with Leslie to bring him back to work, Tait did not specifically state which of Leslie’s rights had been violated. Additionally, Tait did not specifically list or mention the rights that Respondent would refrain from violating in the future. Therefore, even though Tait stated that Respondent understood Leslie’s rights and those rights would not be violated in the future, I find this did not constitute an “unambiguous” repudiation of the proscribed conduct because it is not specific in nature to the coercive conduct.

Furthermore, and more importantly, Respondent admits it did not publicize the grievance resolution in any way. It did not, privately or publicly, inform the other employee who had witnessed the violation that any make whole remedy had taken place, and made no publication to any other employees regarding their rights and Respondent’s attempt to repudiate its unlawful conduct. Without any publication of Respondent’s attempted repudiation, and no assurance to employees that, going forward, there will be no interference with their rights, I cannot find that this admitted violation has been fully remedied.

Accordingly, I find that Respondent’s “repudiation” is both ambiguous and lacks the proper publication required under *Passavant*. Therefore, I find that the admitted violation has not been properly cured and recommend Respondent be ordered to post the attached Notice to Employees to fully remedy its November 2015 Unfair Labor Practice (See Appendix).

**B. Respondent did not violate Section 8(a)(1) of the Act through Tait’s actions towards Leslie on February 9, 2016**

The General Counsel asserts that on February 9, 2016, Tait attempted to provoke Leslie to strike him, by creating a reasonable fear that Tait was going to strike Leslie, and by blocking Leslie’s exit from the conference room, in violation of Section 8(a)(1) of the Act. For the reasons discussed below, I do not find merit to either of these allegations.

The Board has held that an employer violated Section 8(a)(1) of the Act when a supervisor assaulted an employee in retaliation for the employee’s union and protected concerted activities. *Shedd’s Food Products*, 293 NLRB 584 (1989). In *Shedd’s*, a supervisor physically grabbed an employee, and pushed her back 4 or 5 feet during an argument about a grievance. The Board found that physical assault to have unlawfully coerced employees in retaliation for the exercise of their Section 7 rights. I do not find the present case to be analogous to *Shedd’s*, as there is no allegation of any physical contact between Tait and Leslie, and even the conduct alleged does not rise to the level found in the *Shedd’s* case.

The General Counsel seeks to rely on *Yolo Transp.*, 286 NLRB 1087 (1987), where the Board affirmed the Administrative Law Judge's decision finding a violation where a supervisor rushed at an employee as if he was going to grab and hit him in response to the employee telling others that the supervisor liked unions. However, as the General Counsel concedes in its brief, the altercation at issue in the present case was "not as extreme" as that in *Yolo*. Indeed, I find the interaction here to have been categorically different in multiple respects.

First, the supervisor in *Yolo* had gotten so close to the employee there as to cause that employee to back up, and simultaneously raised his hand at the employee as if about to strike. Here, the only evidence of a person needing to back up was Tait's assertion that Leslie had taken a step toward him, causing Tait to take a step back. Not even Leslie alleges being forced backwards. I also do not find credible Leslie's assertion that Tait had clenched fists in a body-builder pose, which Tait denied and Eddington did not corroborate, specifically describing Tait as having been merely pointing his finger.

Second, the witness present in *Yolo* reported needing to jump between the two to prevent a physical fight. Here, the lone witness present in the room at the time, Eddington, testified that he had no sense that a physical altercation was about to occur. At most, Eddington felt embarrassed that the two men were loudly raising their voices. Indeed, rather than jumping between the two men, as happened in *Yolo*, Eddington's response was to try to close the conference room door - the opposite of what one would expect if a physical altercation were about to ensue.

I credit Eddington's testimony on this point, not only because he was present for and had a clear view of the entire episode, but also because as a representative of the Union, he would typically be disposed to support an employee, particularly another union steward. Most importantly, however, his credibility is enhanced because his contemporaneous action in trying to close the door was consistent with what he testified to be his impression at the time based on what he was observing. There is a clear difference between an argument and a physical assault, and I find Eddington's assessment credible that this was merely an argument, and not a physical assault.

Third, with regard to the alleged blocking of Leslie's exit from the conference room, I find that Leslie's exit from the conference room was not blocked at any time during the men's verbal altercation on February 9th. By all accounts, Leslie had a clear path around the conference table to the door exiting the room if he wanted to leave. Indeed, that was the route Leslie took to exit the room upon Davis's arrival, and arguably the most logical route to exit if he were to accompany Eddington, his union representative at the meeting, out of the room, given Eddington's location.

Finally, I find no basis for the General Counsel's theory that Tait was somehow attempting to "provoke Leslie to strike him" by any of his words or actions that day. As the General Counsel correctly notes, the Board's test for 8(a)(1) violations does not turn on the actor's motive or the success or failure of the attempted coercion. Rather, the test is based on whether the actor engaged in conduct, regardless of intent, which reasonably tends to interfere with the free exercise of employee rights under the Act. *American Freightways Co., Inc.*, 124 NLRB 146 (1959); *Roadway Express, Inc.*, 250 NLRB 393 (1980).

Here, there is insufficient evidence to support a finding that Tait assaulted Leslie at this February 9th meeting that he attempting to provoke Leslie into assaulting him, or that he otherwise engaged in conduct which unlawfully interfered with the free exercise of Leslie's rights under the Act.

Accordingly, I find that Respondent did not violate Section 8(a)(1) of the Act through any of Tait's actions toward Leslie on February 9, 2016, and therefore, recommend that portion of the complaint be dismissed.

**C. Respondent did not violate Section 8(a)(3) and (1) of the Act on June 9, 2016 when it discharged Leslie**

**1. Evaluating Leslie's Conduct at the February 9, 2016 meeting Under the *Atlantic Steel* standard**

Leslie clearly was engaged in union activity during the February 9, 2016 meeting. Specifically, the meeting had begun with Tait's going over the rights and rules for union stewards when conducting investigations on the plant floor, and Leslie was present in his role as a union steward. It is undisputed that the meeting devolved into an argument at the end, and that Leslie had shouted "at the top of his lungs" at Tait. Whether he lost the protection of the Act through his conduct during the verbal altercation at the end of the meeting is governed by *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979).<sup>5</sup>

In *Atlantic Steel*, the Board identified four factors to be balanced in making the determination as to whether otherwise protected activity should lose that protection based on an employee's objectionable language: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's "outburst"; and (4) whether the "outburst" was, in any way, provoked by the employer's unfair labor practices. The Act allows some latitude for impulsive conduct by employees in the course of protected concerted activity, but, at the same time, recognizes that employers have a legitimate need to maintain order. The balance between these policy concerns lies at the heart of the *Atlantic Steel* analysis.

**a. The Place of the Discussion:**

The first factor, the place of the discussion, is intended to distinguish between objectionable language made in front of co-workers, e.g., on the production floor, and an outburst that happens in a setting where co-workers are unlikely to hear, e.g., during a grievance meeting or arbitration. The location of an employee's outburst weighs in favor or continued protection when it takes place in nonproduction type areas, and particularly in a meeting-like setting during which an employee is present in the employee's capacity as a union representative. *Alcoa, Inc.* 352 NLRB 1222, 1226 (2008).

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<sup>5</sup> That case normally applies when "an employer defends a disciplinary action based on employee misconduct that is part of the *res gestae* of the employee's protected activity" Public Service Company of New Mexico, 364 NLRB No. 86, slip op. 7 (2016), as the General Counsel argues here. Because, as explained *infra*, I do not find that Leslie's subsequent criminal complaint against Tait was part of the *res gestae* of the parties' February 9, 2016 meeting, this decision analyzes the meeting and the criminal complaint separately.



By contrast, the location of an employee's outburst weighs against protection of the Act when "the employee engages in insubordinate or profane conduct toward a supervisor in front of other employees, regardless of whether there is a likelihood that other employees were exposed to the misconduct." *Starbucks Corp.*, 354 NLRB 876, 878 (2009); *see also Verizon Wireless*, 349 NLRB 640, 642 (2007) (finding that the first factor of the *Atlantic Steel* analysis weighed in favor of losing protection where the conduct occurred in an area where both supervisory and nonsupervisory personnel were likely to hear the employee's profane comments).

Here, it is undisputed that the altercation took place in a conference room near the management and human resources front offices, in the presence of management officials, and not in a work area or plant floor where other unit employees could overhear the discussion.<sup>6</sup> Therefore, I find the first *Atlantic Steel* factor weighs in favor of continued protection.

#### **b. The Subject Matter of the Discussion:**

It is undisputed that the initial purpose of the February 9, 2016 meeting was so HR Manager Tait could remind Leslie of the union steward obligations as set forth in the collective-bargaining agreement. Specifically, Manager Tait wanted Leslie to follow the proper protocol for conducting union investigations while on the plant floor. Tait had learned that Leslie had conducted an investigation purportedly related to a potential grievance, and Tait did not believe Leslie had secured the appropriate permissions to leave his work-station and to talk to another employee. This discussion of the rules applying to union stewards was clearly protected under the Act.

The Board has held that there are limits as to how far an employee can go in the course of exercising his or her protected activity in order to retain the Act's protection. An employee's right to engage in protected activity may permit some leeway for impulsive behavior which must be balanced against the employer's right to maintain order and respect. *NLRB v. Thor Power Tool*, 351 F.2d 584, 587 (7th Cir 1965); *Cibao Meat Products*, 338 NLRB 934, 935 (2003).

Thus, when an employee is discharged for conduct that is part of the *res gestae* of protected activities, the relevant inquiry is whether the conduct is so egregious as to take it outside the protection of the Act or of such character as to render the employee unfit for further service. *Consumer Power, Co.*, 282 NLRB 130, 132 (1986); *Dickens Ins.*, 352 NLRB 667, 672 (2008); *Chromalloy GasTurbine*, 331 NLRB 858, 863 (2000).

Although Respondent argues that the discussion of shop steward regulations ended before the verbal altercation began, I do not find there to have been a sufficient separation between the initial meeting, and the argument which ensued. Almost all the same parties were present, in the same location, and with no passage of time between the meeting and the verbal altercation.

I also note that the verbal altercation included arguing over Tait's characterizing the meeting as "stupid," about whether Leslie was recording the meeting, and ultimately about Leslie's available routes to exit the room. These were all a continuation of the February 9

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<sup>6</sup> There was no evidence presented that non-management employees other than Whitaker, a presumably confidential non-unit employee, and Eddington, a union representative.

meeting, which had not truly ended, and were a part of the res gestae of Leslie's protected activity earlier in the meeting.

Therefore, I find the subject matter of the discussion, both during the meeting and continuing into the altercation, also weighs in favor of protection of the Act.

### c. The Nature of the Conduct:

The Board and the courts have long recognized that in the context of a labor dispute, statements may be hyperbolic, biased, vehement, caustic, and may even involve a "vigorous epithet," while retaining the Act's protection. *DHL Express, Inc.*, 355 NLRB 680, 692 (2010); see also *Valley Hospital Medical Center, Inc.*, 351 NLRB, 1250, 1253 (2007).

In *Tampa Tribune*, 351 NLRB 1324 (2007), the Board explicitly stated that the *Atlantic Steel* balancing test is used to "assess whether an employee's admittedly impulsive and unwise conduct is so severe that it outweighs his or her Section 7 rights." This explanation is also implicit in the language used in *Atlantic Steel*, particularly its choice of the word "outburst" found in the third and fourth factors adopted as a part of the balancing test." Indeed, the Board's *Atlantic Steel* test is specifically designed for cases where something occurs in the course of protected activity that gives rise to an arguable claim that the employee's conduct ceased to be protected.

The Board has repeatedly held that strong, profane, and foul language, or what is normally considered discourteous conduct, while engaged in protected activity, does not justify disciplining an employee acting in a representative capacity. *Max Factor & Co.*, 239 NLRB 804, 818 (1978); *Postal Service*, 250 NLRB 4 (1980). For example, an employee's "disrespectful, angry, and shocking outbursts" toward his manager and president occurred in the context of union activities and did not remove the employee from the protection of the Act. *Lana Blackwell Trucking*, 342 NLRB 1059, 1065 (2004).

The nature of the outburst weighs against protection of the Act when it involves sustained, threatening and intimidating conduct that is directed at a superior. *Starbucks Corp.*, 354 NLRB 876, 878 (2009). In *Starbucks*, the Board reversed an Administrative Law Judge's finding of an unlawful discharge where the employee "deliberately sought to intimidate" her supervisor, joining a group that targeted the supervisor, following him two blocks from the workplace directing profane and threatening remarks toward him.

Here, while not as severe as the conduct in *Starbucks*, I find that Leslie's conduct would somewhat weigh against protection because he did engage in a sustained outburst that was aimed directly at his supervisor, Tait, and was admittedly intended to "push Tait's buttons." Leslie testified that he wanted to show Tait that Leslie was not afraid to stand up to him, and while Leslie made no threatening statements,<sup>7</sup> I do find Leslie's yelling at his supervisor "at the top of his lungs" while nearly face-to-face was at least intimidating.

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<sup>7</sup> Tait's testimony that Leslie took an aggressive step toward him was uncorroborated, and I do find that there was no physical altercation between the two men.

#### d. Provocation by the Respondent:

The fourth *Atlantic Steel* prong, provocation by the Respondent's unfair labor practices would also weigh against protection because I have already found that Respondent did not commit an unfair labor practice through Tait's actions at the February 9, 2016 meeting. However, because I do not find that the nature of Leslie's conduct at the meeting reached a level that alone would justify losing the protection of the Act, I also do not find that the lack of a specific unfair labor practice provocation at the meeting should strip Leslie of the protection of the Act.

In sum, notwithstanding my observations about the nature of Leslie's conduct, which in a non-union workplace might very well lead to an employee's termination, and the fact that Respondent did not commit an unfair labor practice that could be said to have provoked Leslie's outburst, I find that when taken as a whole, the first two *Atlantic Steel* factors outweigh the latter two, and support continued protection of the Act for Leslie's conduct during the February 9, 2016 meeting.

#### 2. Evaluating Whether Leslie's Filing of Criminal Assault Charges Against Tait Was Protected Activity

Notwithstanding the above, I find that Leslie's filing of a criminal complaint against Tait was a separate act, and, contrary to the position of the General Counsel, not part of the res gestae of Leslie's protected activity at the meeting. The meeting had ended, and Leslie had actually returned to work for the remainder of the day. The parties to the verbal altercation were no longer present in the same location, and there was a significant passage of time between the end of the meeting and Leslie's subsequent filing of the criminal complaint. I further find that Leslie's claim alleging that Tait had put him in imminent fear of bodily harm, which was the basis for the criminal complaint, was knowingly false, and not conduct protected by the Act.

The Board has long held that an employee can lose the protection of the Act if he or she engages in an activity that involves either "deliberate falsity" or has the potential of harming another employee's reputation or jeopardizing his employment. See, e.g. *Guardian Industries, Corp.*, 319 NLRB 542, 549 (1995) (noting that "deliberate falsity" can cause an employee to lose protection of the Act); *HCA/Portsmouth Regional Hospital*, 316 NLRB 919 (1995) (noting that "activity designed 'to destroy the reputation and end the employment of another employee'" could also cause an employee to lose the Act's protection).<sup>8</sup>

To illustrate, in *HCA/Portsmouth Regional Hospital*, the Board held an employee was lawfully discharged after spreading false rumors in an effort to have a supervisor demoted or fired. 316 NLRB at 919. The Board adopted the ALJ's holding that protected activity "may lose its protection under circumstances when such conduct includes defamatory statements, bad-faith conduct, or deliberate and malicious falsehoods." *Id.* at 930. To that end, and citing to

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<sup>8</sup> See, also, *Sprint/United Management Co.*, 339 NLRB 1012 (2003) (finding that an employee lost protection of the Act when he sent a false email to employees stating that anthrax had been found in the facility because the inaccurate email "could have ruined longstanding business relationships had the email escaped to the public") and *Ogihara America Corp.*, 347 NLRB 110 (2006) (finding that an employee lost protection of the Act because of his intentional falsification of the name of the sender of package against whom he knew the Employer would likely retaliate.)

*Guardian Industries*, the Board held that "[a] defamatory statement is so opprobrious as to lose the protection of the Act if it is made with knowledge of its falsity, or with reckless disregard of whether it was true or false." *Id.* (internal quotes omitted). The Board further agreed with the ALJ that "it would not effectuate the policies of the Act to reward an employee for trying to destroy the reputation and end the employment of another employee simply to serve her own ends." *Id.* at 931.

Here, I find that Leslie's statements to the police regarding the events of February 9, 2016 were false, that he knew they were false, and that they were indeed "designed to destroy the reputation and end the employment of another employee," namely Tait. Therefore, in the absence of Leslie's prior protected activity, I would uphold the lawfulness of Leslie's June 9, 2016 termination on this basis alone, under *Guardian*, *HCA/Portsmouth Regional Hospital* and the cases that followed.

While this case involves an employee-filed criminal complaint, the analysis is analogous to that in *Bill Johnson's Restaurants Inc., v. NLRB*, 461 U.S. 731 (1983), where the Supreme Court addressed the lawfulness of an employer-filed lawsuit. Stressing the first amendment right to petition the government for redress of grievances, the Court determined that the Board could enjoin the filing of a lawsuit as an unfair labor practice only if the suit was (1) without a reasonable basis in fact or law; and (2) was brought for a retaliatory purpose.

In this case, I find that Leslie had no reasonable basis in fact or law for filing the complaint with the police, but rather, filed his complaint purely as a tool for retaliation against Tait for perceived prior slights. In *Johnson & Hardin Co.*, 305 NLRB 690, 691 (1991), *enfd.* in relevant part 49 F. 3d 237 (6th Cir. 1995), which again dealt with an employer-filed complaint, the Board stated that filing a criminal complaint with governmental officials is, like filing a civil lawsuit, "an aspect of the right to petition the Government for redress of grievances." *Id.* at 691. However, such filings must have a reasonable basis in law and fact.

None of the testimony from the other witnesses at the meeting, including Eddington, corroborated Leslie's account of the event. First, Eddington testified that he did not have a sense that Leslie's life was in danger or that Tait was ever going to hit him or otherwise cause any bodily harm. Second, Tait and Whitaker both testified that Tait kept a calm demeanor during the meeting, while Leslie was the actual aggressor. Davis corroborated this by explaining that when he was in the hall he could only hear Leslie's loud voice, and he went to the conference room because he was concerned for Tait's safety. Leslie claimed that Tait came "flying" at him with his arms up in the air like he was going to bear hug him or fight him. Eddington testified, however, that he never saw Tait's arms up above shoulder level.

I agree with Respondent's argument that the tone of Leslie's text message to Eddington, in which he says "laugh out loud" multiple times, certainly did not seem consistent with someone who was allegedly in fear for his life. Indeed, Leslie admitted that while he was in the February 9th meeting he was purposely trying to "push [Tait's] buttons," provoke him, and "get him going." Leslie even stated, "I wanted to show him I wasn't scared of him and I wasn't scared to be walked out."

Thus, by his own admission, Leslie was not actually afraid of Tait, not even of being "walked out" by him, and he wanted to prove it during the meeting. It is not credible that Leslie could go from successfully proving to Tait that he was not afraid of him to later claiming that he "feared for his life" during his interaction with Tait.

I also find that Leslie's choice of words in his sworn statement summarizing the February 9th meeting further suggests Leslie was intentionally falsely characterizing the facts that took place in the meeting. Leslie had testified about his previous experience as a police officer in Tennessee, acknowledging that he knew the definition of assault under Tennessee law included to "intentionally or knowingly cause another to reasonably fear imminent bodily injury." (GC Exh. 5).

In his affidavit of complaint, Leslie also stated that he was in "intermittent [sic] danger for my life." (GC Exh. 4). Leslie testified that what he meant was that he felt injury was going to occur at that moment. But based on my findings of what occurred at the February 9th meeting, I further find that no reasonable person in Leslie's shoes could have been in imminent fear for their life or of bodily injury.

The fact that the Assistant District Attorney assigned to handle Leslie's case dismissed the charge is certainly not dispositive of what occurred in this case. It is, however, relevant when conducting an analysis of an employer-filed lawsuit under *Bill Johnson's*, because a finding of lack of merit to the employer's lawsuit is the first half of the two-part analysis as to whether the lawsuit constitutes an unfair labor practice, and is one consideration in the Board's determination of an employer's retaliatory motive.

Therefore, I find the criminal complaint filed by Leslie and the statements Leslie provided to law enforcement that alleged he was in fear for his life were knowingly false, and were made in an effort to purposely harm Tait. Accordingly, I do not find that it was activity protected under the Act.

### 3. Evaluating Leslie's Termination Under a *Wright Line* Analysis

I note that the General Counsel relies only on *Atlantic Steel*, and does not address the Wright Line arguments made by Respondent in its brief, despite the fact that this case presents a dual motive situation that compels a *Wright Line* analysis. Indeed, at the June 9, 2016 meeting in which Leslie was terminated, of the five of Respondent's standards of conduct which Davis stated Leslie had violated, at least some related specifically to Leslie's protected activity during the February 9, 2016 meeting. Specifically, Davis testified that Leslie violated its standard #11 based on Leslie's actions on February 9, and its standard #14 at least partly based on those actions.

Because that evidence suggests the potential existence of dual motives for Leslie's discharge, I feel compelled to address Respondent's *Wright Line* defense, even in the absence of General Counsel's reliance solely on *Atlantic Steel*. Under *Wright Line*, 251 NLRB 1083 (1980), if the General Counsel makes a prima facie showing sufficient to support an inference that protected conduct was a motivating factor in the employer's adverse employment action, the burden shifts to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

In light of my above *Atlantic Steel* analysis of Leslie's conduct at the February 9, 2016 meeting, and the fact that Respondent included in its list of standards of conduct that Leslie violated at least one relating solely to that protected conduct, I find that the General Counsel did make the required prima facie showing. Therefore, the burden does shift to Respondent to demonstrate that it would have terminated Leslie's employment solely based on his filing of the criminal complaint against Tait. I find that Respondent has met that burden.

As an initial matter, it is undisputed that Respondent took no adverse action against Leslie in the immediate aftermath of the February 9, 2016 meeting. Indeed, Respondent did not discharge Leslie until June 9, 2016, and at the hearing, Respondent's witnesses repeatedly asserted that the termination was because of Leslie's filing a criminal complaint against Tait, focusing again and again on what they believed were "maliciously false" statements.

Despite Davis having acknowledged that he was concerned with Leslie's conduct at the meeting from the start, I find that he would have terminated Leslie based solely on his filing of a false criminal complaint against Tait, even in the absence of Leslie's protected activity. I found Davis to be extremely credible in describing his feelings about how the complaint affected Tait personally and professionally, and I am convinced from Davis's testimony that it was Leslie's filing of the false criminal complaint that led to his termination.

Respondent also presented un rebutted evidence that Davis had previously terminated an employee for making a false statement, in a much less inflammatory manner. That employee, who worked in the same department as Leslie, had made an error at work that would have been unlikely to lead to termination, but because the employee lied about his involvement in that situation, he was terminated when Respondent learned of the false statement. Here, where the false statement had far more dramatic consequences, I find that Respondent has met its burden under *Wright Line*, and that it would have taken the same action against Leslie even in the absence of his protected conduct.

Accordingly, I find that Respondent did not violate Section 8(a)(3) or (1) of the Act when it terminated Leslie on June 9, 2016, and therefore, recommend that portion of the complaint be dismissed.

### Conclusions of Law

1. On or about November 9, 2015, Respondent violated Section 8(a)(3) and (1) of the Act by restricting Charging Party Laquae Leslie, a union steward, from fully participating in a grievance meeting, threatening him with suspension and discharge for attempting to do so, and suspending him for his union activity.
2. The above violation is an unfair labor practice within the meaning of the Act.
3. Respondent has not otherwise violated the Act.

### Remedy

As I have concluded that the Respondent unlawfully restricted the Charging Party from exercising his Section 7 rights by limiting his participation as union steward in the November 2, 2015 grievance meeting, and thereafter suspending him for having attempted to exercise his statutory rights, I shall recommend that the Respondent be required to notify its employees of the right of union stewards to participate in a grievance meeting and argue on behalf of the employee. The Respondent shall further notify its employees that Leslie's November 2015 suspension was revoked, that any record of the disciplinary action or suspension in his personnel file was removed, and that Respondent had compensated Leslie for the work-time lost as a result of Respondent's unlawful conduct.

As to the remainder of the complaint, I recommend dismissal.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>9</sup>

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## ORDER

The Respondent, Rich Products Corp., its officers, agents, and representatives, shall

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1. Cease and desist from

(a) Restricting union shop stewards from freely participating in grievance meetings;

(b) Threatening union shop stewards with suspension for attempting to participate fully in representational activities,

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(c) Suspending union shop stewards for attempting to participate fully in representational activities,

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(d) In any like or related manner, interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

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(a) Notify all current and former employees that Laquae Leslie's November 2015 suspension was revoked, that any record of the disciplinary action or suspension in his personnel file was removed, and that Respondent had compensated Mr. Leslie for the work-time lost as a result of Respondent's unlawful conduct.

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(b) Within 14 days after service by the Region, post at its Murfreesboro, TN location the attached notice marked "Appendix."<sup>10</sup> Copies of the notice, on forms provided by the Regional Director for Region 10 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since November 2, 2015.

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<sup>9</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

<sup>10</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

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Dated at Washington, D.C., April 6, 2017.

A handwritten signature in black ink, appearing to read "Jeffrey P. Gardner", written over a horizontal line.

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Jeffrey P. Gardner  
Administrative Law Judge



## APPENDIX

**NOTICE TO EMPLOYEES**  
**Posted by Order of the**  
**National Labor Relations Board**  
**An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

### FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Bargain collectively through representatives of their own choice  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities.

**WE WILL NOT** prevent or attempt to prevent union shop stewards from attempting to perform and/or performing their duties, including freely participating in grievance meetings, and otherwise speaking on behalf of other employees.

**WE WILL NOT** threaten union shop stewards with suspension for attempting to perform and/or performing their duties as a shop steward, or for otherwise engaging in activity protected by Section 7.

**WE WILL NOT** suspend employees for attempting to perform and/or performing duties as a shop steward, or for otherwise engaging in activity protected by Section 7.

**WE WILL NOT** in any like or related manner, interfere with, restrain or coerce employees in the exercise of their rights under Section 7 of the Act.

**WE WILL** make Laquae Leslie whole for any loss of earnings and other benefits resulting from his November 2015 suspension.

**WE WILL** within 14 days from the date of this Order, remove from our files any reference to the unlawful November 2015 suspension of Leslie Laquae, and **WE WILL** within 3 days thereafter, notify him in writing that this has been done.

**Rich Products**

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_

By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below:

Harris Tower, 233 Peachtree Street N.E., Suite 1000, Atlanta, GA 30303-1531  
(404) 331-2896, Hours: 8 a.m. to 4:30 p.m.,

You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/10-CA-169627](http://www.nlrb.gov/case/10-CA-169627) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE  
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF  
POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER  
MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS  
PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE  
OFFICER, (205) 518-7517.